

COMSCINST 4205.5	COG CODE N10	DATE 23 FEB 95
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DEPARTMENT OF THE NAVY
 COMMANDER MILITARY SEALIFT COMMAND
 WASHINGTON NAVY YARD BLDG 210
 901 M STREET SE
 WASHINGTON DC 20398-5540

COMSCINST 4205.5
 N10/N2
 23 February 1995

COMSC INSTRUCTION 4205.5

Subj: LEGAL REVIEW OF PROCUREMENT DOCUMENTS

Ref: (a) SECNAVINST 5430.25D
 (b) Navy Acquisition Procedures Supplement (NAPS) 5201.602-2

1. Purpose. To state which procurement documents require review by the Office of General Counsel of the Navy.

2. Applicability. This instruction applies to all Military Sealift Command (MSC) offices exercising procurement authority. This instruction does not apply to procurement documents for small purchase and other simplified purchase procedures in accordance with FAR Part 13.

3. Policy

a. Navy policy provides for legal review of procurement documents for effective protection of the Government. Directors of Contracts and Business Management (N10) at each MSC command are responsible for:

- (1) Requesting a legal review of documents in a timely manner; and
- (2) Ensuring that solicited advice and opinions of Counsel when received timely are considered before the execution of a procurement document.

b. Except when a matter is in litigation before any forum, advice and recommendations from Counsel are advisory only. The ultimate responsibility for any business decision rests with the cognizant contracting officer. In those situations where contracting officers take actions contrary to the advice of Counsel, the events and circumstances relating to that decision must be thoroughly documented in the contract file.

c. All MSC personnel responsible for acquisition planning, establishing technical requirements and/or contracting shall be fully cognizant of legal review requirements and implement the policy contained in references (a) and (b).

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4. Procedures

a. Contracting officers shall forward the following procurement documents, inclusive of supporting data, to Counsel for review prior to execution:

- (1) Solicitations
- (2) Amendments (other than administrative) to solicitations
- (3) Contracts (prior to award) (see NAPS 5201.602-2 and FAR 4.803(a)(24))
- (4) Non-administrative modifications to contracts (see reference (a), para. 9)
- (5) Determinations and Findings (see NAPS 5201.707-91)
- (6) Justifications and Approvals (see NAPS 5206.303-92)
- (7) Source Selection Plans (see Contracting Alert 93-02)
- (8) Determinations concerning mistakes in bid discovered before and after contract award (see FAR 14.406-3(f) and 14.406-4(d), respectively)
- (9) Determinations concerning mistakes in proposal discovered before and after contract award (see FAR 15.607(c)(3) and 15.1005)
- (10) Ratification of unauthorized commitments (see NAPS 5201.602-3(b))
- (11) Exercise of delegated authority for extraordinary contractual actions under DFARS 250.201 (see NAPS 5250.201-70)
- (12) Novation agreements (see FAR 42.1203(d))
- (13) Proposed special purpose termination clauses (see NAPS 5249.501(b))
- (14) New, modified or other clauses not previously approved in accordance with NAPS 5201.304 (Note: It is the responsibility of Counsel to review clauses for legal sufficiency. Review for legal sufficiency does not constitute approval for inclusion in solicitations as required by the NAPS.)
- (15) Contracting officer's proposed settlements and final decisions on claims submitted under the Contract Disputes Act (see FAR 33.211(a)(2))
- (16) Termination documents (show cause letters, cure notices, etc.) (see FAR 49.402-3)

(17) Acceptability of individual sureties (see FAR 28.203 through 28.203-5)

(18) Indemnification requests (see FAR 50.403-2(a))

(19) Contracting officer's reports on proposed suspension/debarment investigations (see NAPS 5209.406-3(a)(i))

(20) Any matters or documents not listed above may be referred to legal counsel at the discretion of the contracting officer.

b. If, due to an emergency or other exigency, Counsel is not available, the contracting officer shall document the circumstances in writing and obtain legal review as soon as possible.

c. Prior to execution of a procurement document, the cognizant Office of Counsel for each MSC command shall review procurement documents submitted and provide (1) an opinion (written and/or oral as dictated by time and circumstances) as to form and legality and (2) any additional pertinent comments or advice. Oral advice from Counsel shall be reduced to writing as soon as possible after receipt.

5. Release of Counsel Opinions. Counsel's memoranda may be subject to attorney/ client privilege, the attorney work product doctrine, or may be administratively sensitive. As such, these documents shall be released only to Government personnel who have a need to know that information. Memoranda which contain Privacy Act information shall be restricted by Counsel in accordance with the law. Counsel's memoranda generally are exempt from release under the Freedom of Information Act as both attorney work product and intra-agency memoranda of the predecisional nature. Improper release of Counsel's memoranda, particularly to contractors, inhibits the ability of Counsel and contracting personnel to deal openly in legal matters, and could result in compromise of the Government's position in litigation. Any release of Counsel's memoranda outside the Government must be coordinated with the cognizant Office of General Counsel.

Distribution:
COMSCINST 5000.19

List I (Case A, B)

SN DL 41B (MSC Area Commands) (LANT & PAC) (20)
41B (MSC Area Commands) (EUR & FE) (10)
41C (MSC Subarea Commands) (10)
41D3(MSC Offices) (5)
41F (MSCCENTACT)